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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TREVOR DUNNE,

Plaintiff and Respondent,

v.

CHARLES LARA,

Defendant and Appellant.

2d Civil No. B210779  
(Super. Ct. No. 1267944)  
(Santa Barbara County)

In this defamation case, Charles Lara appeals from an order denying his special motion to strike Trevor Dunne's complaint as a strategic lawsuit against public participation (SLAPP) pursuant to Code of Civil Procedure, section 425.16.<sup>1</sup> We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from statements Lara posted about Dunne on a Web site "www.ducatispot.com." The Web site includes a public forum that is used by enthusiasts to discuss matters related to Ducati motorcycles. Dunne owns and operates Ducati of Santa Barbara, a motorcycle repair shop. Lara was his customer.

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise stated.

In 2007, John Bragg (not a party to this action)<sup>2</sup> started a discussion on the DucatiSpot forum. Bragg's posting was entitled, "Terrible service at Ducati of Santa Barbara." Bragg complained about work that Dunne's shop had performed on his motorcycle transmission. Bragg wrote, "Th[eir] work ethics and poor service are DANGEROUS to everyone who has any service done by them." Bragg concluded, "So now I am livid and some heads are going to role [sic]!" Other Ducati owners responded with comments about Dunne's work. Some were favorable and some were unfavorable.

Lara joined in with unfavorable comments about Dunne. On December 12, 2007, Lara posted the following comment: "I'd like to give you and all others who might be questioning my motives, all the information I have regarding negligent and illegal work" by Ducati of Santa Barbara.

Ducati of Santa Barbara had been operating without registering as an automotive repair dealer (ARD) as required by California law. The Bureau of Automotive Repair (BAR) notified Dunne of this. In January 2008, he obtained the required license from the BAR.

On March 7, 2008, Dunne responded to the continuing Web postings about him. He threatened to sue for defamation absent a written retraction. Dunne wrote that Bragg and Lara had "filed claims against Ducati of Santa Barbara with two state agencies, The Bureau of Automotive Repair and The District Attorney of Santa Barbara." Dunne wrote that "[a]fter thorough investigation both state agencies found the claims filed by Bragg and Lara to be unfounded and without merit." The record does not contain copies of the claims or the agencies' responses.

Later the same day, Lara posted a comment asserting that he could prove everything he had posted. Lara also wrote, "Why did Dynocycle<sup>[3]</sup> get raided by the FBI. If in fact it did?" Lara wrote, "I believe it all to be true and I'm trying to make sure

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<sup>2</sup> For purposes of this opinion we accept the assumption made by both parties that "Flying Duc" is the username of John Bragg.

<sup>3</sup> Dynocycle was another name under which Dunne had conducted business.

no one gets hurt or killed by what I believe to be negligent and substandard workmanship at Ducati of Santa Barbara." (Emphasis omitted.) On March 19, 2008, Lara wrote that Dunne had committed "fraud and perjury." On March 22 Lara wrote that Ducati of Santa Barbara was "operating an illegal ARD " and "was found to be doing that, a crime in California." He also wrote, "my statements are about the illegal and what I believe to be negligent business practices" of Dunne.

Lara complained to the Department of Consumer Affairs (DCA) about BAR's handling of his complaint against Dunne. On May 1, 2008, the DCA responded to Lara with a letter stating that BAR had "followed the appropriate procedures" and that Dunne "did not misrepresent the ownership of Ducati of Santa Barbara on his initial application."

On May 22, 2008, Dunne filed the present complaint against Lara for libel and slander based on Lara's posted comments.<sup>4</sup> Lara filed a special motion to strike the complaint. (§ 425.16.)

In support of his motion to strike, Lara acknowledged that he posted the alleged comments, but he declared that they were substantially true, based on his research. He declared that he posted the comments "to protect Ducati riders from death or injury" and in anticipation of litigation in two cases: one in which he expected to be a witness against Dunne and one in which he expected to be a plaintiff.

Lara also submitted an excerpt of a news article which stated that "superbikes" are dangerous because they are big and fast and light. Lara declared that he intended his reference to an FBI raid as a question, not an assertion of fact. Lara also submitted court records dating back to 1992 in unrelated matters in which Dunne was a party. Dunne made no objections to Lara's evidence.

In opposition to Lara's motion, Dunne's counsel declared that Dunne had never conducted his business illegally or been charged with doing so and that 24,769

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<sup>4</sup> Dunne also asserted other causes of action which he later dismissed.

viewers had viewed Lara's posted comments. Lara objected to the statements as lacking foundation. The trial court did not rule on the objection.

The trial court denied the motion, finding that Lara had not met his prima facie burden of demonstrating that his statements were made in furtherance of his right to free speech and petition because he had not demonstrated that they were made in connection with a public issue. (§ 425.16, subd. (e)(3) & (4).) The trial court did not address Lara's contention that his statements were made in connection with a matter under review by the BAR and the District Attorney. (*Id.*, subd. (e)(2).)

### DISCUSSION

The "anti-SLAPP" statute, requires a trial court to strike a lawsuit if it has been filed against a person based on that person's conduct in furtherance of their exercise of their constitutional right to free speech and petition, unless the plaintiff can prove a probability of prevailing on the merits. (§ 425.16, subd. (b)(1).) The anti-SLAPP statute is to be construed broadly (*id.*, at subd. (a)), "in a manner 'favorable to the exercise of freedom of speech, not its curtailment.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114, fn. 3.) The purpose of the statute is to encourage participation in matters of public significance and to deter lawsuits that are brought primarily to chill the valid exercise of the rights of freedom of speech and petition for the redress of grievances. (§ 425.16, subd. (a); *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal.4th 180, 192.)

A defendant moving to strike a SLAPP suit must make a prima facie showing that the lawsuit arises from an "act in furtherance of" his constitutional right to free speech or petition. If the defendant meets that burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 894.) We review de novo a trial court's ruling on an anti-SLAPP motion to strike. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 22.)

*Act In Furtherance of Constitutional Rights*

An "act in furtherance of the person's right of petition or free speech" includes, as is relevant here, statements that are made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" (§ 425.16, subd. (e)(2)); statements made in a "public forum in connection with an issue of public interest" (*id.*, subd. (e)(3)); and statements made in any forum "in furtherance of the exercise of" the right to petition and free speech "in connection with a public issue or an issue of public interest" (*id.*, subd. (e)(4)).

Lara contends that he acted in furtherance of his right to free speech and petition because his statements were made in connection with an issue under review by the BAR and in anticipation of civil litigation (§ 425.16, subd. (e)(2)), and because his statements were made on a public Web site in connection with an issue of public interest, motorcycle safety and repair (*id.*, subd. (e)(3) & (4)). His contentions are not supported by the record.

*Issue Under Consideration or Review (§ 425.16, subd. (e)(2))*

Statements made in connection with an issue under judicial or administrative review are protected by section 425.16, subdivision (e)(2), even if the issue is not of interest to the public. (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1113.) The term "in connection with" is to be construed broadly to include "any writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1047.) Statements made in anticipation of litigation are included. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.) Appellant has not demonstrated that his allegedly defamatory statements were made in connection with an issue under governmental consideration or review.

There is evidence in the record that BAR investigated Dunne's ARD registration in response to Lara's complaint and that BAR did determine Dunne was unregistered, in violation of California law. Dunne cured the violation by obtaining an

ARD in January of 2008, before all but one of Lara's statements was posted. The DCA later investigated BAR's decision. Not all of Lara's statements were connected to the BAR or DCA investigation. Lara's comments referred to "negligent and substandard workmanship," "fraud and perjury," "all the information I have regarding negligent and illegal work," and "illegal and what I believe to be negligent business practices." Neither the BAR nor DCA investigated Dunne for faulty workmanship, perjury or fraud. Lara did not include copies of his complaints in the record. Lara posted the question, "Why did Dynocycle get raided by the FBI. If in fact it did?" There is no evidence in the record that any law enforcement agency investigated Dunne's business. There is unrefuted evidence in the record that Dunne has never been charged with illegal business activity. "[C]ouching an assertion in the form of conjecture" does not render it inactionable, if a fact is implied." (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 902.)

Lara also argues that his statements were made in anticipation of litigation. He did not make this argument in his motion to strike, but did submit a reply declaration in the trial court in which he declared that he expected to testify against Dunne and to sue Dunne. The subject matter of that expected testimony and lawsuit are not revealed by the record on appeal and he has therefore not demonstrated that his statements were made in connection with the anticipated testimony or lawsuit.<sup>5</sup> Lara also argues for the first time on appeal that his statements were responsive to Dunne's threat to sue Lara for defamation and were therefore made in anticipation of the present judicial proceeding. Dunne's threatened suit did not involve the issues of perjury and fraud, which Lara injected into the discussion after Dunne threatened to sue. Lara has not met his prima facie burden of showing that section 425.16, subdivision (e)(2) applies.

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<sup>5</sup> On appeal, Lara's counsel refers to a lawsuit by John Bragg, but no court records of that suit were attached to his request for judicial notice in the trial court or included in the record on appeal. Lara did submit Dunne's 2004 answer to a civil complaint of Jeffrey Volpe, in which Dunne denies that he made misrepresentations in the sale and repair of a motorbike, but it does not appear from the record that perjury or illegal activity was the subject of that lawsuit or that Lara participated in it.

*Issue of Public Interest (Section 425.16, subd. (e)(3) & (4))*

Lara contends that his statements were connected to an issue of public interest because he intended to stop Dunne from "doing terrible service and to stop the crime [of] working as unlicensed ARD." Lara's comments were made in a public forum, but they do not enjoy the protection of section 425.15, subdivision (e)(3) and (4) because they expressed only personal dissatisfaction about a single service provider and were not connected to an ongoing discussion on an issue of broader public interest.

A Web site that is open to the public for use free of charge is a public forum for purposes of section 425.16, subdivision (e)(3) (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 895) and section 425.16 subdivision (e)(4) does not require a public forum. However, both subdivision (e)(3) and (4) require that the matter be connected to an issue of public interest. Statements about private disputes are not protected by the statute. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 [publications in trade newsletter accusing a token collector of theft did not involve an issue of public interest and were not protected].)

Defamatory statements are not transformed into issues of public interest merely because they are posted on a Web site. (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 114 [statement on labor union Web site that union manager was fired for financial mismanagement was not connected to an issue of public interest, notwithstanding widespread viewing by union members and a pending governmental investigation into mismanagement of union finances.]) Similarly, "a publication does not become connected with an issue in the public interest simply because it is widely disseminated, or because it can be used as an example of bad practices or of how to combat bad practices." (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 900; *Rivero v. American Federation of State, County and Municipal Employees* (2003) 105 Cal.App.4th 913, 926.)

To determine whether a topic is a "public issue," we must consider whether "(1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct

that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest." (*Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at p. 898.)

Dunne was not in the public eye. He was a local repairman and dealer. A person may become a public figure by injecting themselves into a widespread debate. For example, in *Gilbert v. Sykes*, *supra*, 147 Cal.App.4th 13, a plastic surgeon became a limited public figure when he published three books and appeared on television in a widespread debate about the pros and cons of plastic surgery. But here, Dunne only posted one comment asking Lara and others to stop making statements about an investigation that had concluded in his favor. There is nothing in the record to support Lara's conclusory declaration that "Dunne is a limited public figure in the relatively small Ducati superbike community."

Dunne's conduct could not affect large numbers of people. It could only affect the direct participants: those who bought motorcycles from his Santa Barbara shop or had their motorcycles repaired there. Based on the postings that are included in the record, only a few people joined in Lara's complaints about Dunne.

Finally, Lara's statements did not involve a topic of widespread public interest. A statement about private conduct may be of public interest if it "impacts a broad segment of society" or "affects a community in a manner similar to that of a governmental entity." (*Du Charme v. International Brotherhood of Electrical workers*, *supra*, 110 Cal.App.4th at p. 115.) Here, the statements did not impact a broad segment of society, but were disseminated to a limited community of Ducati enthusiasts. Lara declared that the Web site "is viewed primarily by Ducati motorcycle riders, owners and enthusiasts." Where the potential impact is to such a "limited but definable *portion* of the public" (*Id.* at p. 118), the statements must "at a minimum, occur in the context of an ongoing controversy, dispute or discussion" (*id.* at p. 119) to receive anti-SLAPP protection (*id.* at pp. 118-119).

Lara relies on *Gilbert v. Sykes*, *supra*, 147 Cal.App.4th 13, in which a patient had a Web site which provided educational information about plastic surgery.



Her statements criticizing a particular surgeon were made in connection with a widespread public debate about plastic surgery, a debate in which the surgeon had publicly participated. Here, no ongoing controversy, dispute or discussion was demonstrated. The entire thread of postings focused only on Dunne and Ducati of Santa Barbara. As Lara declared, "unsafe, improper and dangerous work at Ducati of Santa Barbara/Dynocycle/Ducati Santa Barbara was the topic of conversation . . . ." Lara referred to safety in one of his later comments: "I'm trying to make sure no one get[s] hurt or killed by what I believe to be negligent and substandard workmanship at Ducati of Santa Barbara" (emphasis omitted), but he did not comment on anything beyond the conduct of Ducati of Santa Barbara.

Lara points out that the Legislature has acknowledged that unlicensed vehicle repair is a danger to public safety (Bus. & Prof. Code, § 145), but Lara did not demonstrate the existence of an ongoing public debate about Ducati repair or dealership licensing in general. The news article he submitted about dangerous superbikes makes no mention of repair safety or dealership licensing.

Because Lara's comments were limited to complaints about a single dealer, they were unlike the Web postings made in *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th 883 or *Gilbert v. Sykes*, *supra*, 147 Cal.App.4th 13. In *Wilbanks*, a former insurance agent had a Web site that addressed the perils and pitfalls of a particular insurance arrangement and gave advice on how to select brokers. Her warnings about a particular broker, "were not simply a report of one broker's business practices, of interest only to that broker and those who had been affected by those practices." (*Wilbanks*, at p. 900.) Her site was designed to help with broker selection and "was more than a report of some earlier conduct or proceeding; it was consumer protection information." (*Id.* at p. 899.) Lara's comments were no more than a report about Dunne's business practices, of interest only to Dunne's customers and potential customers. Lara has not demonstrated the existence of any widespread public debate and his statements are not protected by section 416.26, subdivision (e)(3) or (4).

Because Lara did not meet his prima facie burden of showing that the lawsuit arose from an act in furtherance of his constitutional rights either in connection with an issue of public interest or an issue under governmental review, Dunne was not required to demonstrate a probability of prevailing on the merits and we will affirm the trial court's order.

DISPOSITION

The order under review is affirmed. Costs are awarded to respondent.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

James W. Brown, Judge  
Superior Court County of Santa Barbara

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